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Justice, and Only Justice, You Shall Pursue: Network Neutrality, the First Amendment and John Rawls's Theory of Justice

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"JUSTICE, AND ONLY JUSTICE, YOU SHALL PURSUE†": NETWORK NEUTRALITY, THE FIRST AMENDMENT AND JOHN RAWLS'S THEORY OF JUSTICE

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† *Deuteronomy* 16:20 (New American Standard), *available at* http://bible.cc/deuteronomy/16-20.htm.

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INTRODUCTION

As broadband becomes the public's technology of choice to access the Internet, it is also emerging as the battlefield upon which the struggle for control of the Internet is being fought.[1] Operators who provide physical access to the service claim the right to discriminate among the content providers who use the infrastructure in which the operators have invested.[2] In contrast, content providers warn that exercising such a policy would "undermine the principles that have made the Internet such a success."[3] This is what has become known popularly and academically as the "network neutrality" battle. Some observers, most notably a former chairman of the Federal Communications Commission (FCC), have defined it as a "battle between the extremely wealthy . . . and the merely rich."[4] Members of Congress have already proposed legal means, often contradictory, for addressing it,[5] and presidential candidates have made their opinions heard as well.[6] For academic observers, analysis of this issue has thus far been confined to the areas of property law,[7] innovation,[8] and competition models.[9]

This study, however, offers a different framework for analyzing the "network neutrality" controversy, one that takes into account that the

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1. *See* Press Release, Federal Communications Commission, Federal Communications Commission Releases Data On High-Speed Services For Internet Access (Jan. 31, 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270135A1.pdf.

2. Spencer E. Ante & Roger O. Crockett, *Rewired and Ready For Combat*, BUSINESS WEEK, Nov. 7, 2005, at 110, *available at* http://www.businessweek.com/magazine/content/05_45/b3958089.htm?chan=search.

3. *Network Neutrality: Hearing Before the S. Comm. On Commerce, Science, and Transportation*, 109th Cong. 1 (2006) (statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google Inc.) (emphasis omitted), *available at* http://commerce.senate.gov/pdf/cerf-020706.pdf.

4. William E. Kennard, Op-Ed., *Spreading the Broadband Revolution*, N.Y. TIMES, Oct. 21, 2006, at A13.

5. *See* Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006); Tom Abate, *Net Neutrality Amendment Dies: Telecommunications Bill Goes to Senate Without Provision Sought By Web Firms*, S.F. CHRON., June 29, 2006, at C1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/29/NET.T; David Hatch, *Sens. Dorgan, Snowe, Revive 'Network Neutrality' Push*, NAT'L J., Jan. 10, 2007, *available at* http://www.njtelecomupdate.com/lenya/telco/live/tb-LNQZ1168461010680.html; Todd Hearne, *Dorgan, Snowe Introduce Net-Neutrality Bill*, MULTICHANNEL NEWS, Jan. 9, 2007, *available at* http://www.multichannel.com/article/CA6405766.html.

6. *See* Charles Babington, *Neutrality On the Net Gets High '08 Profile*, WASH. POST, Feb. 20, 2007, at D01.

7. Brett M. Frishmann & Mark A. Lemley, *Spillovers*, (Am. Law & Econ. Ass'n Annual Meetings, Working Paper No. 27, 2006), *available at* http://law.bepress.com/alea/16th/art27.

8. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2005).

9. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH 1 (2005).

Internet is a new medium of "mass self communication."[10] The Internet provides a unique venue for civic engagement, exposure to information, and opportunity for education. The established frameworks that guide the regulation of traditional media are not necessarily suitable for this new form of communication because they fail to address its multi-participant character (as opposed to the limited-participant technologies of "old media"), and the abundance created by its innovative technological form (as opposed to the scarcity which characterized "old media"). Here arises the urgent need to address this debate in its appropriate context. While others have framed the debate in terms of another battle among the conflicting interests of large corporations, we view it as a struggle between the newly defined classes of haves and have-nots. We contend that using this new frame of reference should provide both those whose interests have been ignored by the regulation of past technologies, and the newly created have-nots, with an opportunity to better their social positioning by enjoying unobstructed access to the Internet as users. Therefore, we propose abandoning the utilitarian philosophy that has characterized U.S. telecommunications regulation—the outcome of which has been promoting the interests of a fortunate few—and adopting the alternative theory of John Rawls's "theory of justice."[11]

As Ithiel de Sola Pool noted in his seminal *Technologies of Freedom*,[12] the regulation of media technologies in the United States has been defined by technological constraints. While the governing principle of speech and printed press regulation (or lack thereof) has been the First Amendment, common carriage and broadcasting developed under vastly different regulatory theories because of their technological attributes. Pool explained the difference between those two types of regulation by noting that "freedom is fostered when the means of communication are dispersed, decentralized, and easily available, as are printing presses or microcomputers. Central control is more likely when the means of communication are concentrated, monopolized, and scarce, as are great networks . . . ."[13] Pool was concerned that although the transition to electronic communications

10. Manuel Castells, *Communication, Power and Counter-power in the Network Society*, 1 INT'L J. COMM. 238, 239 (2006).

11. JOHN RAWLS, A THEORY OF JUSTICE (The Belknap Press of Harvard Univ. 1971) [hereinafter *Theory*]; JOHN RAWLS, POLITICAL LIBERALISM (Columbia Univ. Press 1993) [hereinafter *Political Liberalism*]; JOHN RAWLS, COLLECTED PAPERS (Samuel Freeman ed., Harvard Univ. Press 1999) [hereinafter *Collected Papers*]; JOHN RAWLS, *The Basic Liberties and Their Priority*, *in* LIBERTY, EQUALITY, AND LAW: SELECTED TANNER LECTURES ON MORAL PHILOSOPHY 1 (Sterling M. McMurrin ed., Univ. of Utah Press 1987) [hereinafter *Basic Liberties*]; JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., The Belknap Press of Harvard Univ. 2001) [hereinafter *Restatement*].

12. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (The Belknap Press of Harvard Univ. 1983).

13. *Id.* at 5.

meant more of the media of the first type, legacy regulatory frameworks were being applied to these means of communication because of governments' knee-jerk tendency to regulate and treat them as media of the second kind, even though this was no longer required.[14] One could argue that regulation of the Internet, the most decentralized of technologies, was consequently not justified.

What Pool's analysis does not identify, however, is that although the reasons articulated for the regulation of both legacy networks, broadcasting and common carriage were different, they in fact invoke a similar model. Two levels of scarcity can be identified in each of the technologies that provide communication services: a "physical/technological scarcity," determined by either technological or economic constraints, and a "content scarcity," either in the number of conduits for content or in the diversity of content within those conduits. The question regarding whether or not regulation is required must first be answered by proper identification of the locale of either "scarcity" or "abundance." Scarcity of broadcasters is an outcome of physical constraints[15] while scarcity of common carriers is more of an economic ploy,[16] but in both cases the regulatory solution requires the regulator to prefer the interests of one actor over the interests[17] of another. Under such a regime, a private actor regulates the actions of another actor over a licensed network that suffers from internal, or "content," scarcity. Common carrier licenses limited the right of competitors who wished to provide the same service, while broadcast regulation awarded a license to one at the expense of another's right to free speech. Cable regulation (which was in its infancy when Pool wrote his book in the early 1980s) is a somewhat hybrid case that created a "natural monopoly" (an economic rather than a technological monopoly). A cable company enjoys the status of monopoly provider of a service and eventually is awarded that of a "speaker" who silences others. In all these cases, regulators believed that a greater common good would be reached, as they are charged with securing and protecting "the public interest, necessity, and convenience."[18] This "choice-making" among commercial entities and among members of the public, in general, invokes the utilitarian model. The common result of utilitarian

14. *Id.*

15. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

16. For a description of how elimination of competition and refusal of licenses in the 1920s were orchestrated in the name of a more efficient telephone service, see RICHARD H. K. VIETOR, CONTRIVED COMPETITION, REGULATION AND DEREGULATION IN AMERICA 167–85 (The Belknap Press of Harvard Univ. 1994); Adam D. Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, 2 CATO J. 267, 273–74 (1994).

17. The term "interest" is being used here very carefully, as will be explained further on, to differentiate it from the term "right."

18. 47 U.S.C. § 214 (2007); 47 U.S.C. § 310 (2007); 47 U.S.C. § 151 (2007).

solutions was that those awarded the license over the scarce physical/economic infrastructure gained an advantage regarding the content traveling over it. This advantage was meaningful because content was scarce. However, while physical scarcity remains for broadband Internet, content scarcity does not. The question we raise and answer, therefore, is whether the underlying assumption that interests gained in the physical infrastructure under conditions of scarcity should continue to translate into a right to regulate content under the guise of scarcity, or whether the introduction of abundance in the content layer allows rethinking the underlying theory of utilitarianism that has guided telecommunications regulators since the beginning.

Following this introduction, Section II reviews two competing theories of justice—utilitarianism and Rawlsian distributive justice—and their general relevance to communication policymaking. Although it embraces capitalism and the role of markets in fair regulation, Rawls's theory nonetheless offers a methodology for ensuring basic freedoms and rights while correcting the ills of the past before adopting new policies. Traditional utilitarianism lacks this methodology. Section III describes three historical narratives of policy development that informed the choice of policies regulating access and content of the Internet: the regulation of broadcasting, common carriage, and cable television. Section III further demonstrates that these policy choices assumed scarcity at a "physical/technological" level and at a "content level," which led to the design of policy as a utilitarian solution: maximization of the total common good at the expense of individual members of society on both levels. The policies that developed in the "old media" awarded a few the right to provide services based on assumptions of scarcity, and, as a result, provided these players with an advantage in the dissemination of content over the networks they built, which themselves suffered from content scarcity. Section IV describes the unique role of the Internet in both mass communications and multimodal personal communication, and explains why ensuring unobstructed egalitarian access to its content requires a different theoretical framework. Section V explains that legacy regulation threatens freedom on the Internet because traditional First Amendment interpretation is limited to bi-modal scenarios; the current regulatory framework leaves those who control access to the Internet unregulated; and the courts have termed the right of carriage of signals awarded due to "physical scarcity" equivalent to a First Amendment speech right. Section VI demonstrates how Rawls's theory of justice better fits the Internet and better serves the public interest. This provides a theoretical justification for our conclusion that awarding the owners of the still-scarce physical network the right to discriminate among users of

the content-abundant network, when they acquired this right under conditions of scarcity of content that no longer exist, perpetuates a distortion of power that cannot be justified.

The materialization of the promise of the Internet requires its maintenance as an open and neutral network. We are therefore concerned about the continued reliance on legacy policies and intend to offer here a new underlying theory for regulation of access to the Internet. We suggest that although Rawls's theory preceded the popularization of the Internet by decades, it has the power to bridge the different policy narratives and offer a framework for maintaining the free nature of the Internet because it addresses both the social and economic nature of the Internet policy debate, accepts the general framework of market economy and capitalism, focuses on protecting fundamental rights, and proposes an egalitarian, fair, and just solution.

I. COMPETING THEORIES OF JUSTICE

A. *Utilitarianism*

Utilitarian solutions in this study are defined as solutions that conform to the principles of utility developed by the eighteenth century philosopher Jeremy Bentham and later explicated by his disciple John Stuart Mill and others. According to Bentham, "[a] measure of government . . . may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it."[19] And as Mill further explicated: "[H]appiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned."[20] However, "the equal claim of everybody to happiness in the estimation of the moralist and the legislator, involves an equal claim to all the means of happiness, except in so far as the inevitable conditions of human life, and the general interest, in which that of every individual is included, set limits to the maxim; and those limits ought to be strictly construed."[21]

Utilitarian solutions conform to three main principles that, as will be later discussed, are strikingly different from the Rawlsian approach advocated in this paper. First, they are goal-oriented rather than rights-based. Second, they are focused on maximizing the size of the economic

19. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 13 (Clarendon Press 1995).

20. JOHN STUART MILL, UTILITARIANISM 15 (Alex Catalogue of Electronic Texts) (1863), *available at* http://infomotions.com/etexts/philosophy/1800-1899/mill-utilitarianism-218.htm.

21. *Id.* at 52.

cake rather than on the way the cake is distributed. Third, they may justify, perhaps even require, favoring the few at the expense of the many in the name of the "common good."

In addition, utilitarian philosophy has provided the basis for adopting the idea of freedom of expression into U.S. jurisprudence. The root of the concept of the "marketplace of ideas" can be traced back to Mill's philosophy,[22] as can the concept of social responsibility of the press,[23] which evolved out of recognition of the dangers of concentration of the ownership of the press in the hands of a few.[24] Such concerns have been seen as the precursor to the theory of access to the press,[25] a theory which in fact questions whether the "marketplace of ideas" can function without a "legal imposition of legal responsibilities."[26] Utilitarian theory has been used to justify regulation under scarcity because it justifies silencing voices for the sake of the common good under conditions of scarcity and conditions that require making choices, and used to critique the fact that utilitarian solutions do not fix past distortions.[27]

The commonalities in the regulatory frameworks of the broadcast licensing, common carriage, and cable technology industries emerge from the use of utilitarianism to address the scarcity technological constraints create. The broadcasting licensing scheme chooses among competing requests for provision of service based on the content obligations of the licensees. Regulation of common carriage was based until 1996 on a similar assumption. The scarcity on the physical/technological level was dictated by economic assumptions as was the regulation of "content." A similar process exists in cable technology. Although there is little explicit acknowledgement of cable's natural monopoly of physical/technological scarcity, current cable regulation nonetheless accounts for this fact. As was the case in broadcasting and common carriage, lawmakers, regulators, and eventually, the courts, realized that physical/technological scarcity requires intervention to develop and protect diversity within the cable content offering. The intervention chosen, however, has elevated the "rights" of the network owners to speech rights and ensured the

22. ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD, 191 (Oxford University Press 1999).

23. Adam S. Plotkin, *The First Amendment and Democracy: The Challenge of New Technology*, 11(4) J. MASS MEDIA ETHICS 236, 239–40 (1996).

24. THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATIONS (University of Chicago Press 1947).

25. Jerome Barron, *Access to the Press—a New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

26. *Id.* at 1674.

27. By past distortions we mean the existing relations of power, created by the limited number of corporations controlling the broadcasting spectrum, common carriage, and cable television. These relations of power have extended commercial entities' physical control over networks to include content control as well.

retransmission of channels that already enjoy preference in the scarce spectrum at the expense of an undefined number of others.[28] The utilitarian conception of justice informs each of these regulatory models.

B. *Rawls's Theory of Distributive Justice*

The theory of justice developed by John Rawls, one of the most influential Anglo-American political philosophers of the twentieth century,[29] has been described as the "most influential of all twentieth century theories of justice."[30] Rawls's theory of justice[31] regulates the procedures under which a society determines the rules that pertain to what he calls the basic structure of society,[32] which are its fundamental institutions, such as the law and the economy. Rawls assumes that these "first principles of a conception of justice,"[33] the principles that are to regulate all further agreements,[34] should create the conditions for all decisions to be reached in a rational manner.[35] To arrive at a rational discussion, the participants in the discussion must participate unaware of their own circumstances and how they themselves will fare as a result of the decision reached. This hypothetical situation, which Rawls refers to as "the original position,"[36] is reached under a "veil of ignorance."[37]

The principles derived from the original position aim to arrange social institutions, such as markets, into a "scheme of cooperation."[38] There

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28. Notably, in Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (*Turner I*) (1997), the Supreme Court accepted as fact that content scarcity had little or no effect on cable operators or programmers:

> 94.5 percent of the cable systems nationwide have not had to drop any programming; the remaining 5.5 percent have had to drop an average of only 1.22 services from their programming; operators nationwide carry 99.8 percent of the programming they carried before must-carry; and broadcast stations gained carriage on only 5,880 cable channels as a result of must-carry. The burden imposed by must-carry is congruent to the benefits it affords because, as appellants concede, most of those 5,880 stations would be dropped in its absence. Must-carry therefore is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable.

Id. at 182. However, this does not change the fact that the problem was scarcity, and the solution that was offered was utilitarian.

29. John S. Dryzek & Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation* 33 B.J. POL. S. 1 (2003).

30. SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 9 (Basic Books 1989).

31. *See generally* RAWLS, *supra* note 11.

32. RAWLS, *Theory*, *supra* note 11, at 7.

33. *Id.* at 13.

34. *Id.* at 11.

35. *Id.* at 13.

36. *Id.* at 17.

37. *Id.* at 17–22.

38. *Id.* at 54–55.

are two principles: (1) that the basic liberties of each person, including freedom of speech, which falls under the basic liberty of freedom, should be guaranteed;[39] and (2) that existing social and economic inequalities should be arranged so that they benefit all,[40] particularly providing the greatest advantage to the least advantaged members of society.[41] The idea is that the fortunes of the better off should not be established and secured unless it also advantages the least fortunate.[42]

The least fortunate are defined, in a cyclical way, through the identification of "primary goods,"[43] things that free and equal citizens need in order to cooperate fully as members of society (as well as pursue their own conceptions of the good). First on the list are the basic rights and liberties,[44] defined as those rights which allow citizens to make use of their basic moral powers, primarily the capacity for a sense of justice.[45]

However, it does not follow from a guarantee of the basic liberties that they cannot be regulated.[46] Indeed, regulation may be required in order to turn freedom of "speech" into freedom of "discussion,"[47] because the ultimate goal of maintaining basic liberties is to allow members of society to participate in the decision-making process itself. The need for discussion illustrates the unique standing of basic rights: because every egalitarian expansion comes at the expense of others, and of the conversation itself, by ensuring that everyone possesses some rights, the rights become self-limiting.[48] Because the choice is made from a position of ignorance, the principles must benefit all free and equal persons in a well-ordered society. Basic freedoms, and the priority they demand, are fundamental to such persons with a sense of justice and the capacity to pursue their own good.

Thus, rules of discussion become necessary. However, based on the same principles and Rawls's notion that "liberty may only be limited for the sake of liberty and not for the sake of other social and economic advantages,"[49] rules of discussion can only be created by the participants themselves. Further, these rules can only be considered if all participants, particularly the least advantaged, have bettered their position in

39. *Id.* at 60–61.
40. *Id.* at 60.
41. *See* RAWLS, *Collected Papers*, *supra* note 11, at 392.
42. RAWLS, *Theory*, *supra* note 11, at 75.
43. RAWLS, *Restatement*, *supra* note 11, at 58.
44. *See id.* (listing the primary goods).
45. *Id.* at 18.
46. *Id.* at 111.
47. RAWLS, *Basic Liberties*, *supra* note 11, at 9–10.
48. RAWLS, *Political Liberalism*, *supra* note 11, at 341.
49. H.L.A. Hart, *Rawls on Liberty and its Priority* 40 U. CHI. L. REV. 534, 534 (1973).

the end.[50] Consequently, certain regulations may be legitimately enacted on private property that in itself is not necessary for a sufficient articulation of the basic rights (controlling natural resources, rights of acquisition and the right for inheritance);[51] however, the denial of equal political liberties (and not privileged ones) cannot be based on the fact that their existence may enable them to block "policies needed for economic efficiency and growth."[52] Rawls's theory targets individual liberties. Distortions in the power structure that are rooted in the past, however, need to be corrected before implementing the free market rules, so that those who currently are the least fortunate can improve their position.

Rawls's theory of justice offers an alternative to traditional utilitarian thought[53] that has historically been at the core of free speech theory. Classic utilitarianism aims to maximize the total social good at the expense of individuals, while Rawls's theory of distributive justice adopts the maximin rule, which establishes that inequalities in income and wealth that might result from a strategy of efficiency or maximization are permissible only if they maximally benefit the least advantaged.[54] As a result, a society is created that is "rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."[55]

II. HISTORICAL NARRATIVES

A. *Broadcasting*

The first communication technology to be explicitly regulated under the presumption of physical scarcity was the electromagnetic spectrum. Most historic accounts characterize it as a chaotic spectrum that required a guiding hand. However, such accounts fail to recognize that broadcasting actually emerged as a medium for hobbyists and entrepreneurs who discovered its potential as a means of communication.[56] The corporate establishment only displaced them once it realized broadcasting had publicity and advertising potential.[57] The laws and regulations which

50. RAWLS, *Theory*, *supra* note 11, at 302

51. RAWLS, *Restatement*, *supra* note 11, at 114.

52. RAWLS, *Basic Liberties*, *supra* note 11, at 8–9.

53. *See, e.g.*, Michael R. Gardner, *Rawls on the Maximin Rule and Distributive Justice*, 27 PHIL. STUD. 255, 255 (1975).

54. *See* RAWLS, *Theory*, *supra* note 11, at 154 (explaining the maximin rule).

55. *Id.* at 22.

56. THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES 61 (University of Chicago Press 1996).

57. *Id.*

eventually evolved turned broadcasting into a "linchpin of the consumer economy," marginalizing all of its other potential uses.[58] Radio, for example, was portrayed in the popular media as a medium so complex that only large and powerful corporations could put it to the right use.[59] This "use" meant realizing its potential as a unifying force, capable of connecting the atomized communities of America into one community that shares "thoughts, ideals and purposes."[60] The legal framework designed to serve the development of this big promise culminated in the Radio Act of 1927[61] and the Communications Act of 1934.[62] In both these acts, the criterion set for awarding licenses for use of the spectrum was the licensee's presumed service to the "public interest, convenience and necessity,"[63] a phrase selected for lack of a better idea.[64]

Having received a general and rather obscure mandate, the Federal Radio Commission (FRC), formed by the 1927 Radio Act, soon began providing its own statutory interpretations. Aspiring broadcasters who were more interested in the dissemination of political, religious, social, or economic viewpoints were shunned, and clear preference was given to broadcasters who offered programming with broad entertaining appeal. Because it was not possible to award every opinion a place in the spectrum, the FRC opted to leave them all out.[65] This prompted the establishment of national radio networks, whose market share grew from six percent to thirty percent between 1927 and 1931.[66] When the Federal Communications Commission (FCC) believed that these networks were reverting to non-competitive practices that endangered the efficient use of the airwaves, the FCC, created by the 1934 Act, sought to limit their power and gained the backing of the United States Supreme Court in its quest.[67] In supporting the FCC's actions, the Court explained that "the facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many

58. *Id.*

59. SUSAN J. DOUGLAS, INVENTING AMERICAN BROADCASTING, 1899–1922 304 (Johns Hopkins University Press 1987).

60. *Id.* at 306 (quoting Stanley Frost, *Radio Dreams That Can Come True*, COLLIER'S, June 10, 1922, at 18).

61. 47 U.S.C.A. §§ 81–83 (repealed 1934).

62. Pub. L. No. 416, 48 Stat. 1064 (1934).

63. *See* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 608–13 (1998) (giving a history of the public interest standard).

64. *Id.* at 610.

65. ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY 27 (Oxford Univ. Press 1993).

66. *Id.* at 29.

67. Nat'l Broad. Co. v. U.S., 319 U.S. 190, 216 (1943).

who apply."[68] The Court further explained that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States."[69] Thus, in the *National Broadcasting Co.* decision, the Court both established scarcity as the motivation for regulation and accepted that under these conditions the best solution in "the public interest" is maximizing the benefits of radio to all citizens. In this way, scarcity led to a utilitarian solution which accepts preferring one applicant over another and leaves the latter applicant without an independent outlet. Indeed, as the Court stipulated:

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. . . . Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[70]

The connection between regulation of scarcity and free speech was challenged yet again in the 1969 case of *Red Lion Broadcasting Co. v. FCC*.[71] In this case, the Court upheld the now defunct "fairness doctrine" and reiterated the connection between free speech and scarcity. In doing so, the Court invoked the rights of the public at large, and in particular, First Amendment rights.[72] While the Court repeated its assertion that a connection exists between the First Amendment and broadcasting, it added that the government may choose to restrain licensees "in favor of others whose views should be expressed on this unique medium."[73] The Court stated that it is the people, as a whole, who have a collective right to free speech that supersedes that of broadcasters.[74] "There is nothing in the First Amendment," explained the Court, "which prevents the Government from requiring a licensee to share his frequency with others. . . ."[75] The "fairness doctrine," which served as the justification and impetus for the *Red Lion* ruling, was eventually scrapped,[76] and the general public's speech was again forfeited in the name of the greater

68. *Id.*
69. *Id.* at 217.
70. *Id.* at 226–27.
71. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
72. *Id.* at 375.
73. *Id.* at 390.
74. *Id.*
75. *Id.* at 389.
76. Syracuse Peace Council v. FCC, 867 F.2d 654, 665 (D.C. Cir. 1989).

public good. Later the Court reverted to the position that no individual had a "*general* right of access to the media,"[77] and took a step further by stating that treading "unnecessarily on the editorial discretion of broadcasters contravene[s] the First Amendment."[78] The exclusive license awarded to broadcasters to address physical scarcity was protected under the First Amendment.

The fairness doctrine was deemed obsolete for several reasons, two of which are relevant to this study. First, the Court found that the public had access to enough viewpoints as a consumer. Second, the Court agreed with the FCC that scarcity was no longer an issue because "the communications market as a whole provides 'reasonable assurance' of public access to viewpoint diversity,"[79] citing the advent of cable television and the existence of channels such as CNN and C-SPAN.[80] With the "elimination" of physical scarcity, the need to encroach on the rights of licensees to satisfy unidentified right-less "speakers" had disappeared.

B. *Common Carriage*

The regulation of common carriage has developed through the acknowledgement of a de facto scarcity. This may have been reluctant and unplanned, but ever since Theodore Vail's 1907 assertion that "universal service" should be provided by one system,[81] the Willis-Graham Act of 1921 that recognized telephony as a natural monopoly to be regulated as a utility,[82] and the consent decree of 1984 that established the Regional Bell Operating Companies as monopolies of local service,[83] there has been no doubt that common carriage was designed as a service provided by a monopoly. The provision of a service by a monopoly creates an immediate "physical" scarcity, which may require regulation of the "content" scarcity. The effect of the physical scarcity on the content scarcity within telephone networks of common carriage has been dealt with, just as in broadcasting, in a utilitarian fashion. The process has become known as the "computer inquiries."

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77. CBS, Inc. v. FCC, 453 U.S. 367, 396 (1979).

78. *Syracuse Peace Council*, 867 F.2d at 684.

79. *Id.* at 685.

80. *Id.* ("For example, one well-known cable channel, whose chief anchor is blessed with the name of Bernard Shaw, is devoted solely to news; two cable channels are given over to coverage of Congress and related issues.").

81. *See* Milton Mueller, *Myth Made Law (Telecommunications Act of 1996)*, COMM. OF THE ACM, March 1997, at 39.

82. *See generally* Stuart Daggett, *Telephone Consolidation Under the Act of 1921*, 7 J. LAND & PUB. UTIL. ECON. 22 (1931).

83. U.S. v. AT&T Co., 552 F. Supp. 131, 222–27 (D.D.C. 1982).

The first "computer inquiry" was launched in 1966[84] and ruled on in 1971.[85] It was instigated by the growth of data processing services over telephone lines and resulted in a ban on the participation of AT&T, which was at the time an all-encompassing telephone monopoly, in the provision of data services.[86] The second "computer inquiry," launched in 1976[87] and resolved in 1981,[88] however, allowed AT&T to provide data services (that by now had been renamed "enhanced services"), but only through a separate subsidiary to prevent discrimination against providers of competing services. In 1986, when the FCC launched the third computer inquiry,[89] it proposed eliminating the requirement for structural separation[90] and replacing it with an open network architecture (ONA) requirement that would allow all providers of enhanced services equal access to the components of the monopoly telephone network.[91] This proposal encountered fierce legal challenges,[92] however, that were not resolved by the time the Telecommunications Act of 1996, which adopted a new regulatory regime that introduced competition in local telephony, was passed. The deregulatory spirit of the computer inquiries was embraced by the law. What had been recognized as monopoly services requiring regulation as common carriage were renamed "telecommunication services," and what had been identified in the "old order" as "enhanced services," to be mostly de- or non-regulated, were renamed "information services." Once again, the process of gradually providing the fortunate with control acquired due to "physical scarcity" over the "content scarcity" repeated itself: a prohibition to provide "content" services; a requirement to provide them through a separate

84. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service and Facilities, 7 F.C.C.2d 11 (1966) (notice of inquiry).

85. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 267 (1971) (final decision and order).

86. *See generally* Jason Oxman, *The FCC and the Unregulation of the Internet* (FCC Office of Plans and Policy, Working Paper No. 31, 1999); Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003).

87. Amendment of Section 64.702 of the Commission's Rules and Regulations, 61 F.C.C.2d 103 (1976) (notice of inquiry and proposed rulemaking).

88. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 88 F.C.C.2d 512 (1981) (memorandum opinion and order on further reconsideration).

89. Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986) (report and order).

90. *Id.* at 964.

91. By then, AT&T was not the provider of local access following the consent decree issued in U.S. v. AT&T, 552 F. Supp. 131, 222–27 (D.D.C. 1982), but rather the Regional Bell Operating Companies (RBOCs).

92. *E.g.*, California v. FCC, 39 F.3d 919 (9th Cir. 1994).

subsidiary; and the unregulated sharing of the network structure with competitors in the provision of "content" services.

C. *Cable*

Cable services are a hybrid of broadcasting and telephony, at least technologically. Indeed, it is rather ironic that the diversity promised by the advent of cable television was among the justifications for "liberating" broadcasters from the "constraints" of the fairness doctrine, for as soon as the potential of this service was realized, so was its potential capability for encroaching on a field dominated by broadcasters. Cable television has been identified as "another instance in a longstanding tradition of blind optimism in technologies to bring about social change."[93] Like broadcasting, it initially held great promise for promoting diversity of voices and a "communication revolution."[94] But cable is also a technology of both "physical" and "content" scarcity. Therefore, in 1972, the FCC launched a full-fledged assault on cable television, fearing its negative impact on broadcasters.[95] The rules it enacted then were gradually perceived as obsolete, and by the end of the decade, they had all but disappeared.[96] However, most of these rules, in particular those imposing limitations on cable operators in order to protect broadcasters, were not scrapped because they were seen as an imposition on cable operators' First Amendment rights. In fact the Supreme Court ruled that the FCC had the authority to regulate cable television even before such authority was granted through legislation.[97] The FCC's authority included proactive requirements for production and dissemination of content that the FCC found to be in the public interest.[98] Citing the 1943 *National Broadcasting Co.* decision,[99] which dealt with broadcasting, and applying it to cable, the Court stated:

> The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying regulations sustained in National Broadcasting Co. v. United States

93. Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. COMM. 52, 55 (1992).

94. SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 2 (McGraw Hill 1971).

95. *See* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 L. & CONTEMP. PROBS. 77, 97 (1981).

96. ROBERT W. CRANDALL & HAROLD FURCHTGOTT-ROTH, CABLE TV: REGULATION OR COMPETITION? 5 (R.R. Donnelley and Sons, Co. 1996).

97. U.S. v. Sw. Cable Co., 392 U.S. 157, 178 (1968).

98. U.S. v. Midwest Video Corp., 406 U.S. 649, 662–71 (1972).

99. *See* Nat'l Broad. Co. v. U.S., *supra* note 67.

> . . . . In essence the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and voice received by the subscriber, while in the other it is with the content of the programming offered. But in both cases the rules serve the policies . . . of the Communications Act on which the cablecasting regulation is specifically premised.[100]

Unlike broadcasting, the regulation of cable began with few First Amendment concerns because of the government's intervention in programming content.[101] The government's requirement that cable television maintain a minimum of original programming was perceived as a means of ensuring that cable service "satisfactorily meets community needs within the context of their undertaking."[102]

"Must-carry" rules that required carriage of local signals that generated an interest for third parties were not challenged in court initially.[103] Only in the 1980s were "must-carry" rules found unconstitutional[104] by a court of appeals because of its incidental burden on cable operators' speech. "Must-carry" rules only gained the "constitutional" stamp of the Supreme Court after they became part of the Cable Television Consumer Protection and Competition Act of 1992.[105] However, the Supreme Court first granted the distribution of cablecasts over the cable network its own stamp of approval by recognizing it as speech.[106] In *Turner I*[107] the Court stated outright that "cable programmers and cable operators engage in and transmit speech and they are entitled to the protection of the speech and press provisions of the First Amendment."[108] Later, in a second case, four of the Justices on the Supreme Court justified their finding that the "must-carry" rules are constitutional by citing the furtherance of the government's interest in promoting fair competition by protecting local broadcasting's economic health, by preserving the benefits of free, over-the-air local broadcast television, and by promoting the widespread dis-

100. *Midwest Video*, 406 U.S. at 669.

101. *See, e.g., id.* at 709 n.19 (while declining to reach the question posed in the lower court of whether the "Commission's rules might violate the First Amendment rights of cable operators" and, instead, basing its decision on "statutory grounds," the Court still acknowledged that such a question was "not frivolous").

102. *Id.* at 670.

103. Besen & Crandall, *supra* note 95.

104. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452, 1462–63 (D.C. Cir. 1985).

105. Pub. L. No. 102–385, 106 Stat. 1460 §§ 4, 6 (inserting § 614 to and amending § 325 of the Communications Act of 1934, 47 U.S.C. § 531).

106. Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994).

107. *Id.*

108. *Id.*

semination of information from a multiplicity of sources.[109] Justice Breyer concurred that the rules were constitutional, but only on the latter two grounds.[110] Hence, according to the four concurring Justices and Justice Breyer, the government's creation of the "must-carry" rules balanced opposing rights of users of the cable infrastructure the same way it forces the users of the electromagnetic spectrum in the broadcasting analogy to share the airwaves. Justice Breyer, however, was the only one who saw these as competing speech interests.

The *Turner* decisions sought to create a compromise between the two users of the infrastructure—over-the-air broadcasters and cable operators. The need for compromise arises from the fact that the infrastructure, at least de facto, is a monopoly with limited capacity, and that mandating certain uses over it necessarily comes at the expense of other uses, or as the *Turner I* Court put it: "must-carry" rules "reduce the number of channels over which cable operators exercise unfettered control," and "render it more difficult for cable programmers to compete for carriage on the limited channels remaining."[111] This ruling reflects the prevalent philosophy that only cable operators were deemed to be "speakers," while the rights of broadcasters remained mostly economic.[112]

This same mindset is evident in the regulation of cable vertical integration rules. While a "speech enhancing" rule for independent cable programmers seems to be more substantiated, it is also based on economic considerations. Although the rules themselves are currently unsettled following their elimination by the District of Columbia Circuit Court of Appeals,[113] the law authorizing the FCC to draft them was found to be constitutional.[114] This law states that the FCC may "prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[115] The court agreed that

109. Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 189–90 (1997).

110. *Id.* at 225.

111. *Turner I*, 512 U.S. at 637.

112. The only case to date advancing the proposition that cable infrastructure is a monopoly is Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982). This could be because it seems axiomatic, or at least it did until 1996, but whether or not the courts referred to the proposition specifically does not mean it cannot be inferred from their actions.

113. Time Warner Entm't v. FCC (*Time Warner II*), 240 F.3d 1135, 1142–44 (D.C. Cir. 2001).

114. Time Warner Entm't v. FCC (*Time Warner I*), 211 F.3d 1313, 1322 (D.C. Cir. 2000).

115. 47 U.S.C.A. § 533(f)(1)(B).

such an imposition on cable operators "is designed to increase the diversity of voices available to the public,"[116] and that

> [a] cable operator is unlike a newspaper publisher . . . in the one respect crucial to the Congress's reason for enacting the channel occupancy provision: A newspaper publisher does not have the ability to exclude competing publications from its subscribers' homes. The cable operator's bottleneck monopoly is a physical and economic barrier to such intra-medium competition.[117]

As a result, the Court established that "[v]ertical integration in the cable industry . . . gives cable operators the incentive and ability to favor their affiliated programming services. Thus, for example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers"[118] and it is a legitimate government concern that justifies limiting cable operators' editorial discretion. This does not amount to protecting the speech rights of programmers. Rather, it protects their economic rights from suppression by conflicting corporate interests. The court's assertion regarding horizontal integration limits to be imposed on cable operators, that "[t]he Commission is on solid ground in asserting authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow," demonstrates this.[119] Still, the court later found that both the horizontal and vertical integration ratios set by the Commission were conjectural, at best, and not substantiated by fact.[120]

III. THE ROLE OF THE INTERNET IN THE NETWORK SOCIETY

Similarly to the historical accounts of radio and cable television in history, the Internet carries immense potential. The Internet serves as the basis of a "global web of horizontal communication networks that include the multimodal exchange of interactive messages from many to many both synchronous and asynchronous,"[121] which can be described simultaneously as "mass communication," "multimodal," and "self generated in content, self directed in emission and self selected in reception."[122] As such, the Internet carries the promise of inclusiveness as

116. *Time Warner I*, 211 F.3d at 1321.
117. *Id.* at 1321–22.
118. *Id.* at 1320.
119. *Time Warner II*, 240 F.3d 1131, 1142–44 (D.C. Cir. 2001).
120. *Id.* at 1134.
121. Castells, *supra* note 10, at 246.
122. *Id.* at 248.

a mass medium not only received by the many, but also created by the many.

The Internet was never meant to evolve into what it has become, and has therefore taken the world by surprise.[123] What started in the late 1960s as a technology designed to overcome an imminent Soviet nuclear attack and serve the interests of the military, developed into a proprietary network serving universities and research institutions, and eventually into a global network connecting individual computers, large corporations, and governments over telephone and cable television lines. The Internet has a "world-wide broadcasting capability" that provides "a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."[124]

While garnering very little attention at its inception and for the first two decades of its existence, the Internet rose in prominence in the 1990s when the backbone of the network, maintained until then by the National Science Foundation and serving only research related activities, was privatized. Its connection to tens of thousands of regional and local networks, which had developed since the late 1980s and were commercially funded, created a worldwide network. The Internet's emergence as an instant global network captured the attention of both commercial actors and governmental institutions. While the former envisioned the development of multitudes of new services over this network[125] and began devising ways to profit from allowing access to the network, the latter were considering whether and how policy should respond to the challenge regarding both the content of the network and the means to access it. Such regulatory and legal wrangling demonstrates the central role the Internet plays in educational, civic, and commercial life. This also emphasizes why its regulation requires a new theoretical perspective, one that accounts for network access and content.

The most significant steps taken to address these issues were the initiatives undertaken by the Clinton-Gore Administration soon after the 1992 elections. The newly established National Information Infrastructure

123. WOLFGANG TRUETZCHLER, MEDIA POLICY: CONVERGENCE, CONCENTRATION & COMMERCE 75 (Denis McQuail & Karen Siune, eds., Sage Publications 1998).

124. Barry M. Leiner et. al, *Histories of the Internet*, Internet Society, (Dec. 10, 2003), http://www.isoc.org/internet/history/brief.shtml.

125. David C. Mowery & Timothy Simcoe, *Is the Internet a U.S. Invention?—An Economic and Technological History of Computer Networking*, 21 (2001), *available at* http://www.druId.dk/uploads/tx_picturedb/ds2001-255.pdf ("In 1995, there were a total of 657 information technology-related venture capital financings worth $3.3 billion. In 1999, four years later, there were more than 1,600 deals with a combined valuation in excess of $20 billion.").

Task Force prepared a report outlining an "Agenda for Action."[126] The report stipulated that "[a]ll Americans have a stake in the construction of an advanced National Information Infrastructure."[127] The report outlines the implications of this universal concern and the need to create policy "in a technology neutral manner so that no one industry will be favored over any other."[128] It further stated that the "value of the National Information Infrastructure to users and the nation will depend in large parts on the quality of its other elements,"[129] not its physical components, but rather "the information itself."[130] That information, according to the report, "means empowerment"[131] and, therefore, the government has an obligation to ensure access for all Americans.

The ensuing Telecommunications Act of 1996[132] was "designed to create a regulatory platform that would permit broad competition among different kinds of telecommunications service providers."[133] It seemed more focused, however, on the former Bell companies' desire to control both the content and conduit of the emerging new technology.[134] Still, the breadth of the legislation and its focus on both content and conduit suggests that even in the early stage of Internet development, its central role in society was already evident to Congress. The Telecommunications Act of 1996[135] addressed a few issues related to the Internet, but its most significant contribution was blocking access to ("bad") content rather than encouraging the contribution and access to ("good") content. For example, Title V of the proposed act, which included an amendment to section 223 of the Communications Act of 1934, criminalized transmission of obscene or indecent material targeting minors over the Internet.[136] The Supreme Court found this prohibition to be unconstitutional because it abridges the freedom of speech protected by the First Amendment.[137] This set a standard for speaker rights over the Internet, albeit of the indecent kind. With regard to the issue of conduits, the new law was less

126. INFORMATION INFRASTRUCTURE TASK FORCE, THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION (Executive Office of the President 1993).

127. *Id.* at 1.

128. *Id.* at 5.

129. *Id.* at 6.

130. *Id.*

131. *Id.*

132. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

133. PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 8 (Guiford Press 1999).

134. *Id.* at 37.

135. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

136. *Id.* § 502, 110 Stat. 56.

137. Reno v. ACLU, 521 U.S. 844, 885 (1997).

Internet–specific, and some of its more central features, namely the interconnection[138] and unbundling[139] regimes, can be interpreted as focusing on plain old telephone service. It did, however, introduce one Internet-specific directive regarding physical access to the network, calling for the establishment of what is popularly known as the E-rate: subsidized Internet access to all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.[140] This directive focused on physical access, an element of the Internet promise that cannot be overlooked but is beyond the scope of this discussion on network neutrality. The unique U.S. E-rate policy notwithstanding, some have argued that a more vigorous pursuit of a national agenda would have prevented the United States from losing its world leadership position in broadband penetration and dropping down to twenty-first place.[141] This trend has not gone unnoticed by the political establishment. As late as the presidential elections of 2004, the incumbent President George W. Bush promised in his campaign universal broadband access by 2007.[142] He emphasized its importance to national infrastructure, a promise also echoed by his challenger, Senator John F. Kerry of Massachusetts.[143]

The importance of access to the Internet cannot and should not be downplayed. The Internet serves as an alternative to traditional media. The first major example of its power was the Internet's role in exposing President William Jefferson Clinton's affair with a White House intern.[144] The Clinton scandal also illustrates how the existence of a new non-traditional means of reporting can help overcome the inhibitions of the traditional cozy-with-the-administration press. However, the gossip-oriented beginnings of the Internet cannot detract from its role as a major resource for newsgathering. Recent research reports that the number of Americans who check the Internet for news every day almost doubled between 2002 and 2004 to 50 million, and that the percentage of Americans who went online for election news jumped from thirteen percent in

138. 47 U.S.C.S. § 251(a)(1) (2007).

139. 47 U.S.C.S. § 251(c)(3).

140. 47 U.S.C.S. § 254(h).

141. Richard Hoffman, *When It Comes to Broadband, U.S. Plays Follows the Leader*, INFORMATION WEEK, (Feb. 15, 2007), http://www.informationweek.com/story/showArticle.jhtml?articleID=197006038.

142. Declan McCullach, *Bush: Broadband for the People by 2007*, ZDNET, (Apr. 26, 2004), http://news.zdnet.com/2100-3513_22-5200196.html; Scarlet Pruitt, *Bush Calls for Broadband for All by 2007*, INFOWORLD, (Mar. 29, 2004), http://www.infoworld.com/article/04/03/29/HNbushbroadband_1.html.

143. Catherine Yang, *Here Comes Broadband John; Kerry is Set to Roll Out an Ambitious Plan to Boost High Tech—and Woo Silicon Valley*, BUSINESS WEEK, Apr. 19, 2004, at 84.

144. BILL KOVACH & TOM ROSENTIEL, WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA 11–12 (The Century Foundation Press 1999).

the 2002 election cycle to twenty-nine percent in 2004.[145] While many Internet users use the medium to access their traditional news sources in electronic format, the Internet has also emerged as a tool for providing information suppressed by the media establishment through alternative information services such as Indymedia.[146]

The Internet's pivotal role in civic communications, however, is not confined to the access it provides to news and information. The Internet has also played a significant role in decentralizing the political process and facilitating the creation of grassroots political movements. One of the first to see the potential in the Internet was former Vermont Governor, and 2004 presidential hopeful, Howard Dean. Using the Internet, Dean was able to raise more funds than his opponents, mostly through small, online donations.[147] While Dean was crowned "the Internet candidate" back in 2004, "his efforts to campaign online seem primitive" today.[148] The Internet has come to play such a key role in disseminating information about the political process and in promoting participation in it that some observers would argue that the rules on focusing advertising, generating funds, mobilizing popular support, and (unfortunately) spreading negative information are changing.[149] They cite, for example, the use of YouTube.com during the 2006 mid-term elections, prompting one observer to describe this as "the first youtube election."[150] Others have focused on the future effects of the democratization of the media and the growing transparency of campaigns,[151] as well as the growing reliance of politicians on the Internet for campaigning.[152] The extent of civic engagement, thanks to the Internet, is not limited to election times and to Washington politics. As Katz and Rice demonstrate, the Internet can and has become a tool supporting collective action of the pre-Internet disenfranchised, allowing them to overcome blocked access to

145. Adam Nagourney, *Internet Injects Sweeping Change into U.S. Politics*, N.Y. TIMES, Apr. 2, 2006, at 1.

146. WIM VAN DE DONK, BRIAN D. LOADER, PAUL G. NIXON & DIETER RUCHT, CYBERPROTEST: NEW MEDIA, CITIZENS AND SOCIAL MOVEMENTS 19 (Wim van de Donk, Brian D. Loader, Paul G. Nixon and Dieter Rucht, eds., Routledge 2004).

147. *See* Gary Wolf, *How the Internet Invented Howard Dean*, WIRED, Jan. 2004, http://www.wired.com/wired/archive/12.01/dean.html.

148. Jose Antonio Vargas & Sam Diaz, *Online Firms Boot Up for Political Campaigns*, WASH. POST, Mar. 17, 2007, at D01.

149. Nagourney, *supra* note 145.

150. *The First YouTube Election: George Allen and "Macaca"*. (Tim Dickinson ed. 2006), ROLLING STONE, Aug. 15, 2006, http://www.rollingstone.com/nationalaffairs/?p=426.

151. Carrie Budoff, *Senators Fear Having A "Macaca" Moment: Smallest Slip-Ups Can Tank A Campaign, Thanks To YouTube*, THE POLITICO, Feb. 2, 2007, http://www.cbsnews.com/stories/2007/02/02/politics/main2425882.shtml.

152. Frank Davies, *Candidates find both opportunity, minefield on Web*, THE MERCURY NEWS, Feb. 19, 2007, http://www.siliconvalley.com/mld/siliconvalley/16732852.htm (web site no longer available).

the corridors of power in order to affect the decisions of local government.[153] As Gurak and Logie establish, political and consumer protests that take advantage of the significant features of the World Wide Web can be effective,[154] even in the face of growing corporate and government cynicism toward cyberprotest.[155] Political activism is only one side of civic participation. No less important is the role of education, and there is "decisive evidence that technology use can lead to positive effects on student achievement."[156]

Not all have seen the potential of the Internet in such a positive light. Studies of its early days in both Washington[157] and Amsterdam[158] point to the fact that, at least initially, some of the "democratizing" initiatives undertaken by national or local governments were little more than top-down communications controlled by those who already held the reigns of power. Contemporary analyses of the democratizing powers of the Internet have not necessarily become more optimistic. Downey, for example, finds that "the democratic optimism surrounding the Internet should not blind us to the realities of the political economy of the media."[159] Giacomello observes that national governments wish to control the Internet as an integral part of their national security policies.[160] Vegh points out the universality of undemocratic practices vis-à-vis the Internet, whether driven by political or by commercial motivations.[161] However, as Friedland observed as far back as the mid-1990s, while the analysis of emerging social networks based on the Internet may be challenged by a critique of their contribution to a deliberative democracy,

153. JAMES E. KATZ & RONALD E. RICE, SOCIAL CONSEQUENCES OF INTERNET USE: ACCESS, INVOLVEMENT, AND INTERACTION 127 (MIT Press 2002).

154. Laura J. Gurak & John Logie, *Internet Protests, from Text to Web*, *in* CYBERACTIVISM: ONLINE ACTIVISM IN THEORY AND PRACTICE 25 (Martha McCaughey & Michael D. Ayers, eds., Routledge 2003).

155. *Id.* at 26.

156. *Testimony and Statement for the Record of Margaret Honey before the Labor, HHS, and Education Appropriations S. Subcomm.* (2001) (statement of Margaret Honey, Vice President of Education Development Center), *available at* http://main.edc.org/newsroom/features/mhtestimony.asp#1.

157. Kenneth L. Hacker, *Missing Links in the Evolution of Electronic Democratization*, 18 MEDIA, CULTURE & SOCIETY 213, 219 (1996).

158. Kees Brants, Martine Huizenga, Reineke van Meerten, *The New Canals of Amsterdam: An Exercise in Local Electronic Democracy*, 18 MEDIA, CULTURE & SOCIETY 233, 235 (1996).

159. John Downey, *Surveillance from Below: The Internet and the Intifada*, *in* IDEOLOGIES OF THE INTERNET 158 (K. Sarikakis, D. Thussu, eds., Hampton Press 2006).

160. Giampiero Giacomello, NATIONAL GOVERNMENTS AND THE CONTROL OF THE INTERNET: A DIGITAL CHALLENGE 5 (Routledge 2005).

161. Sandor Vegh, *Profits Over Principles: The Commercialization of the Democratic Potentials of the Internet*, *in* IDEOLOGIES OF THE INTERNET 63 (K. Sarikakis, D. Thussu, eds., Hampton Press 2006).

their enabling function for the establishment of new forms of citizen interaction and relationships should not be overlooked.[162]

The benefits the Internet offers are by no means trivial. For the individual, the Internet offers: the acquisition of alternative information and viewpoints, a center for civic participation, and a network for expression and participation in the marketplace. The question of Internet access is a question of both "physical" and "content" access, and the ability to access and contribute to the network. Merely because explosive growth of the Internet in the 1990s in the United States has been a response to market demands, does not and cannot mean that future growth of the Internet should be unfettered. Indeed, a free market does not mean a chaotic market in which power determines prominence and dominance. Rather, the Internet requires rules that will allow it to realize its potential, as well as a theory to guide them. The rules chosen thus far, however, have achieved the opposite.

IV. LEGACY REGULATION AND ITS THREAT TO NETWORK NEUTRALITY

The passage of the Telecommunications Act of 1996 marked a new era for broadcasters, cable operators, and common carriers because it allowed them to provide new services unavailable under the "old order." Broadcasters were given additional spectrum over which they were allowed to provide more channels, cable operators were allowed to provide telephone services, and local operators were allowed to provide video services. But most importantly, the Act marked the advent of the Internet and created the regulatory framework for its introduction. As Ithiel de Sola Pool observed,[163] policymakers more often than not regulate new technologies based on analogies with technologies of the past. As our discussion has so far demonstrated, several possible policy narratives can explain Internet regulation, none of which are promising.

A. *Applying First Amendment Theory to Net Neutrality: The Problems of the Bi-Modal Approach*

The utilitarian interpretation of the First Amendment sees government as the only threat from which the speaker needs protection. The silencing of individuals that emerges from governmental preference for a defined group of speakers is justified because it promotes the common good. It is an "outgrowth of the dissension of the European settlers who

162. Lewis A. Friedland, *Electronic Democracy and the New Citizenship*, 18 MEDIA, CULTURE & SOCIETY 185, 189 (1996).

163. DE SOLA POOL, *supra* note 12, at 7.

populated North America—men and women seeking to escape from social rigidities, to exercise a larger measure of economic freedom, to form governments and government structures that they might control rather than the other way around."[164] The resulting narrow perception of the First Amendment is based on the notion that government power is the main threat to free expression[165] and that two parties, and only two parties, are relevant—the speaker-dissenter who wishes to speak, and a government that wishes, for whatever reason, to silence her.[166] The *Turner* decisions illustrate this point well. In classifying the must-carry rules as content-neutral, Justice Kennedy noted that the "privileges" conferred by the must-carry provisions are unrelated to content, and that the rules "benefit" all broadcasters who request carriage.[167] The Court does not characterize broadcasters as possessing an independent free speech interest. Rather, broadcasters are entities that are "privileged" and "benefited" by the must-carry provisions, as if these provisions were mere windfall. As a result, broadcasters do not play any role in the balancing process that the intermediate standard dictates, except for a "representation" by proxy in the governmental interests asserted to justify the must-carry provisions. Similarly, the individual cable subscribers are only mentioned in the context of the bottleneck problem for the purpose of differentiating *Turner* from the *Tornillo* precedent,[168] in which the Supreme Court protected newspapers from a speech enhancement requirement. When weighing the competing free speech interests of one against the other, the equation drawn by the Court contains only two variables: the cable operators (and the cable programmers' merging interests), and the government. This bi-modal construction of the First Amendment might result in the limitation of speech-enhancing regulation, no matter how praiseworthy.

When confronted with the complexity of the Internet arising from its evolution into a multilateral speech environment, the Supreme Court has taken two basic, yet different, routes for addressing the discrepancy between the bilateral legal conceptualities and the multilateral developing realities. The first has abandoned existing categories and standards in

164. ROLAND S. HOMET JR., POLITICS, CULTURES, AND COMMUNICATION: EUROPEAN VS. AMERICAN APPROACHES TO COMMUNICATIONS POLICYMAKING 4 (Aspen Institute for Humanistic Studies 1979).

165. *See, e.g.*, Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 737–38 (1996) (suggesting no First Amendment implications in government regulations permitting broadcasters to censor their own programming); Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 685 (1994) (O'Connor, J., dissenting).

166. *See* Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1116 (1992).

167. *Turner I*, 512 U.S. at 644.

168. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

favor of a case-by-case balancing of interests, as illustrated in its ruling in *Denver Area*.[169] The second has reduced the multilateral setting into a bilateral one through one of the following two mechanisms: (1) a second-level reduction of First Amendment rights—usually the rights of those who "gain" from the government regulation—into a component of the governmental interests;[170] or, (2) treatment of private entities as quasi-public, based on their characteristics and/or the nature of their activities. In *Turner*, the Court used the first mechanism, second-level reduction, to simplify the First Amendment dilemma by transforming specific individual First Amendment rights into a component of abstract governmental interests, which are inherently inferior to the individual rights on the opposite sides of the equation. The second mechanism involves identifying governmental characteristics in private entities or "state action" in their activities, such as monopoly status, the exercise of quasi-public functions, or subjection to licensing requirements or government regulation.[171] The basic flaw in each of these approaches in the context of the Internet is that they both retreat to the familiar bilateral government-speaker equation, which is completely incompatible with the realities of a multiple-speaker environment and which can generate multilateral speech conflicts.[172]

Scholars have traced the understanding of the First Amendment in broad, positive terms, for the sake of enhancing democratic deliberation, to the work of James Madison[173] and Thomas Jefferson.[174] In modern legal history, the notion that government may take action in order to enhance speech and realize First Amendment objectives (as opposed to the utilitarian "marketplace" metaphor formulated by Justice Oliver Wendell Holmes in his famous *Abrams* dissent)[175] can be traced to the work of Alexander Meikeljohn[176] and Justice Black's widely cited passage in *Associated Press v. United States*.[177]

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169. *Denver Area*, 518 U.S. 727 (1996).

170. *See* Campbell, *supra* note 166, at 1116.

171. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 374 (1974) (Marshall, J., dissenting); CBS v. DNC, 412 U.S. 94, 173–81 (1973) (Brennan, J., dissenting).

172. Some cases (although few and isolated) seem to depart from the rigid bilateral concept. The most salient of these cases is probably Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

173. *See* Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L. J. 137, 156–57 (1994).

174. *See generally* Ben Scott, *A Broad, Positive View of the First Amendment*, *in* THE CASE AGAINST MEDIA CONSOLIDATION 39 (Mark N. Cooper ed., McGannon Center for Communication Policy, Fordham University 2007).

175. Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

176. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Lawbook Exchange 2001) (1948).

177. In *Associated Press* the Court stated:

B. *The Common Carrier Regulation Legacy*

The major challenge regulators had to address with regard to the new framework created by the law was the introduction of competition to markets that had been characterized, perceived, and regulated as natural monopolies for decades. Constrained by the technological bias inherent in the Communications Act, which dictated different foundations for existing regulations, Congress did not attempt to create a unified and technologically neutral policy, as was the case in Europe,[178] but rather clung to existing classifications. Consequently, even though local phone companies were now allowed to provide multi-channel television services and cable companies were allowed to provide voice-telephony, and both were allowed to provide Internet access, each operator was to expect specific regulations based on its legacy. Inevitably, this technologically constrained reality led to the development of conflicting solutions, which, nonetheless, preserved the utilitarian structure from which they emerged.

One policy thread limited by the Act's technological bias was the introduction of the dichotomous relationship between "information services" and "telecommunication services." As noted above, this distinction was created to deregulate data applications over telephone lines. The first major challenge to these definitions came when the city of Portland, Oregon, conditioned the transfer of a cable franchise on a cable operator's granting unrestricted access to its cable broadband facilities to all competing Internet Service Providers (ISPs). The district court upheld this decision[179] on the grounds that the local franchising authority can regulate "cable services" in order to preserve competition.[180] The district court also cited the authority's use of the "essential facility" doctrine, a doctrine developed to ensure that non-duplicatable facilities deemed necessary for the provision of a service are shared between their owners

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> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Associated Press v. U.S., 326 U.S. 1, 20 (1945).

178. J. Scott Marcus, *The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications* 12–13 (FCC Office of Plans and Policy, Working Paper No. 36, 2002), *available at* http://esnie.u-paris10.fr/pdf/textes_2004/Wilkie_Marcus.pdf.

179. AT&T v. City of Portland, 43 F. Supp. 2d 1146, 1156 (D. Or. 1999).

180. *Id.* at 1152.

and their competitors,[181] an economic-technological rationale. The court of appeals, however, reversed this decision,[182] finding that "transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act,"[183] and therefore beyond the jurisdiction of the local franchising authority. Both the substantial issue at stake and the need to ensure the provision of an essential service under conditions of competition failed to guide the decision. Rather, a jurisdictional dispute informed by technological (and one could argue, irrelevant) issues grounded the decision. This ruling, however, gave rise to a series of regulatory determinations and challenges.

As described above, "telecommunication services" were the Telecommunication Act's 1996 heirs to the "computer inquiries'" classification of "basic services," which were to be regulated as "common carriers" under Title II of the Communications Act.[184] The *City of Portland* decision could have subjected cable operators who provided Internet access to the provisions of new section 251 of the Act,[185] which includes requirements to interconnect to all other providers of telecommunication services[186] and contribute to the Universal Service Fund.[187] Following this unforeseen development, the FCC published a declaratory ruling that established broadband access to the Internet over cable facilities should be seen as an interstate information service,[188] and therefore, not subject to Title II regulation. This ruling was challenged successfully in court,[189] leading the Supreme Court to reverse this position and establish that cable modem access to the Internet is indeed an information service.[190] Thus, a scarce resource, physical access to the Internet, was declared "unregulated," marking a historical turn in telecommunication regulatory policy. For the first time, a physical element of the network, undoubtedly scarce, was deemed unregulated. The Court did note, in dicta, that the FCC "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."[191] However,

181. *Id.* at 1150.
182. AT&T v. City of Portland, 216 F.3d 871, 880 (9th Cir. 2000).
183. *Id.*
184. 47 U.S.C.S. § 153 (2007).
185. 47 U.S.C.S. § 251 (2007).
186. 47 U.S.C.S. § 251(a).
187. 47 U.S.C.S. § 254(b)(4).
188. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling, 17 F.C.C.R. 4798, 4802 (2002).
189. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).
190. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 999–1003 (2005).
191. *Id.* at 996.

the FCC chose not to pursue a regulatory path, but rather to deregulate Internet access over DSL technology as well.

This followed another legal scuffle over the interpretation of a mechanism for overcoming initial barriers to entry of competitive local exchange carriers, introduced in the 1996 Act.[192] This mechanism, the "unbundling" regime, was also a remnant of the "computer inquiries,"[193] and, just like the "computer inquiries," it offered an economic solution to a challenge posed by scarcity. The FCC was required to develop a list of unbundled network elements (UNE) within six months of the Act's passage.[194] Instead, within ten years, the unbundling requirement, despite being found constitutional, was emptied of any substance[195] as the FCC specifically deregulated broadband services. At first, in its 2003 Triennial Review Order,[196] the FCC decided not to require incumbents to unbundle their fiber-to-the-home (FTTH) local loops in places where the fiber loop had not previously existed. In places where they had existed, unbundling was required only if the incumbent had retired its copper infrastructure, but even then only for the provision of "narrowband" services.[197] The court approved this policy[198] because it foresaw the elimination of "physical" scarcity through "intermodal" competition involving deregulated cable and common-carrier facilities.[199] The court believed competition among facilities eliminates "physical scarcity."

By the time the court published the *Earthlink* decision in the summer of 2006, the FCC had further deregulated broadband access to the Internet. In applying the aforementioned *Brand X* decision, it adopted the *Wireline Facilities Order*, under which DSL access to the Internet should also be defined as an "information service."[200] This dramatic turn of events deregulated telephone companies' broadband services and put them on par with cable operators' because now neither were obligated to provide their ISP competitors with access to their lines,[201] either for fiber

192. 47 U.S.C.S. § 251(c)(3) (2007).

193. Cybertelecom.org, Unbundled Network Elements, http://www.cybertelecom.org/notes/une.htm (last visited Mar. 16, 2007).

194. 47 U.S.C.S. § 251(d).

195. For a detailed description of the gradual erosion of the unbundling regime in the U.S., *see* Rob Frieden, *Unbundling the Local Loop: A Cost/Benefit Analysis for Developing Nations*, 7 INFO: J. POL'Y, REG. AND STRATEGY FOR TELECOMM. 3, 6–10 (2005).

196. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978 (2003).

197. *Id.* at 17142.

198. Earthlink, Inc. v. FCC, 462 F.3d 1, 13 (D.C. Cir. 2006).

199. *Id.* at 5.

200. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order, 20 F.C.C.R. 14853, 14862–65 (2005).

201. Ted Glazner, *Unpacking the Brand X Decision*, TMCNET, June 27, 2005, http://www.tmcnet.com/usubmit/2005/jun/1158573.htm.

technology, or for the legacy copper network. In a two-front assault, the FCC shed its generation-long utilitarian reasoning by eliminating the unbundling regime and defining all broadband access to the Internet as "information services." This left the Internet access playing field open to only two viable competitors,[202] as if no "physical scarcity" existed anymore. Hence, in the face of the challenges created by the Act, both the FCC and the courts combined to create a technological duopoly based on legacy networks,[203] and currently both networks enjoy the same defense from regulation and a reluctant-to-regulate FCC.[204] The upshot is that legacy owners of the infrastructure can now discriminate among their users while acting "under the radar" of regulatory authorities.

C. *The* Turner *Legacy*

The incorporation of the utilitarian approach into the regulation of "information services" and the threat it imposes on network neutrality is further accentuated by the legacy of the *Turner* decisions. If neutrality rules were enacted and were perceived as limiting Broadband Service Providers (BSPs) from exercising control over their privately owned network, they could be seen as a version of "must-carry" (albeit with a much lesser problem of channel scarcity). The governmental interests

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202. Cable and DSL providers currently control almost ninety-eight percent of the residential and small-business broadband market and more than one quarter of consumers have only one choice between cable and DSL. Even in markets with both services available, customers usually face a duopoly, with one choice for each type of service. *See* S. Derek Turner, *Broadband Reality Check: The FCC Ignores America's Digital Divide*, 3 (2005), http://www.freepress.net/docs/broadband_report.pdf.

203. This policy choice should be seen in an international comparative context as well, in particular with regard to the policy choices made by the European Union and its member states. This includes a pan-European unbundling policy, *see* Council Regulation 2887/2000, On Unbundled Access To The Local Loop, 2000 O.J. (L 336) 6, 7 (EC). At least Holland, which enjoys the second highest broadband penetration level in the world, OECD Broadband Statistics to June 2006, www.oedg.org (enter "Broadband Statistics to June 2006" under "Search" at top of page, follow "OECD Broadband Statistics to June 2006" hyperlink) (last visited November 15, 2006), has passed a law that requires even cable companies to unbundle their local loops, *see* http://www.jupiterresearch.com/bin/item.pl/research:vision/1243/id=98485 (last visited March 16, 2007) (website no longer available).

204. See Chairman Martin's statement following the AT&T BellSouth merger in December 2006:

> The conditions regarding net-neutrality have very little to do with the merger at hand and very well may cause greater problems than the speculative problems they seek to address. These conditions are simply not warranted by current market conditions and may deter facilities investment. Accordingly, it gives us pause to approve last-minute remedies to address the ill-defined problem net neutrality proponents seek to resolve.

AT&T Inc., FCC 06-189, (Fed. Commc'ns Comm'n Dec. 29, 2006) (Joint Statement by Chairman Martin and Commissioner Tate).

that could justify network neutrality rules are almost identical to the interests recognized by the Court in *Turner* as substantial governmental interests. Both cases involve "technological-physical" scarcity, and both present a complex set of conflicting First Amendment rights and interests. Thus, the threat to network neutrality that arises from this development is rooted mostly, though not exclusively, in the challenges raised by the Court's *Turner* decisions. The circumstances of *Turner* lead us to conclude that the *Turner* decisions (which one would assume could support a neutral network provision, just as they upheld "must-carry") jeopardize network neutrality for the following reasons.

First, BSPs, like cable operators, can be reasonably characterized both as conduits and as editors,[205] even if their activities are not identical to those of cable television operators, and even if over the Internet users generally have more control over their own content.[206] Given the anticipated development of IP Television, the nature of network neutrality will more closely match the circumstances of *Turner*. Thus, BSPs have at least the potential to exercise editorial discretion.[207] As net neutrality proponents, we are the first to acknowledge that BSPs, and their activities as such, might enjoy at least some degree of First Amendment protection, as "every sort of network proprietor to try this line of argument has succeeded."[208]

Second, Justice Kennedy, writing for his three colleagues in the plurality in *Turner*, stated that even if government interests are sufficiently important in the abstract, that does not mean that the must-carry rules will in fact advance those interests, since the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[209] Indeed, Justice Kennedy agreed that courts must accord substantial deference to the predictive judgments of Congress. Nevertheless he added that the Court's obligation is to assure that, "in formulating its

205. Frederick Schauer, *Cable Operators as Editors: Prerogative, Responsibility, and Liability*, 17 HASTINGS COMM. & ENT. L.J. 161, 175 (1994).

206. *See* Ex parte letter from Tim Wu, Associate Professor, University of Virginia, and Lawrence Lessig, Professor of Law, Stanford Law School, to Marlene H. Dortch, Secretary, Federal Trade Commission (Aug. 22, 2003) (http://faculty.virginia.edu/timwu/wu_lessig_fcc.pdf); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 107, 118 (2006).

207. In fact, wireless broadband service providers, for example, have been very clear about having an editorial agenda. *See* Tim Wu, *Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband* 12–14 (New Am. Found. Wireless Future Program, Working Paper No. 17, 2007), *available at* http://www.newamerica.net/files/WorkingPaper17/_WirelessNetNeutrality_Wu.pdf.

208. Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War With Itself*, 35 HOFSTRA L. REV. 1211, 1221 (2007).

209. *See* Turner Broad. Sys. v. FCC (*Turner I*), *supra* note 106, at 664.

judgments, Congress has drawn reasonable inferences based on substantial evidence,"[210] which he felt were not made, even though the must-carry rules were enacted "after conducting three years of hearings on the structure and operation of the cable television industry."[211] However, only after further factual findings were made by the lower court and not by Congress, was the *Turner II* Court willing to uphold the must-carry rules. The "substantial evidence" requirement imposed by intermediate scrutiny, or "intermediate plus" scrutiny,[212] poses a real problem for network neutrality rules because the discussion surrounding this issue is mostly forward-looking, and thus "the core claims of proponents and opponents of net neutrality are difficult to test systematically against historical empirical evidence."[213] In the case of network neutrality, examples of discrimination performed by BSPs[214] are mostly anecdotal. At this stage, a clear and compelling body of empirical evidence that BSPs are unfairly blocking access to Web sites or online services is lacking,[215] even though BSP motivation to do so seems apparent.[216]

There is, however, at least one important difference between *Turner* and the network neutrality situation in the present context. Internet technology uses "packet-switching," and therefore does not suffer from the problem of "content scarcity." Neutrality rules would not impair the BSPs' ability to carry any content they wish to carry or require a BSP to carry any user or content provider at the expense of another. Paradoxically, the fact that their freedom of expression is not jeopardized further protects cable and telephone operators from regulation designed to prevent them from abusing their dominant position. While the absence of "content scarcity" on the Internet has led at least one commentator to argue that an "open access regime" should require only rational basis, and not intermediate scrutiny, to support its constitutionality,[217] the absence of scarcity has traditionally served as a reason for the Supreme

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210. *Id.* at 666.

211. *Id.* at 632; *see also* Goodman, *supra* note 208, at 1220 ("[Congress] held more than a dozen hearings, accumulated a legislative record of more than 30,000 pages, and made detailed findings based on a decade's experience with intermittent must-carry rules.").

212. Goodman, *supra* note 208, at 1219.

213. Johannes M. Bauer, Professor, Dept. Telecomm., Info. Studies, and Media, Mich. St. Univ., *Dynamic Effects of Network Neutrality*, paper presented at the 35th Conference on Communication, Information and Internet Policy (Sept. 29–Oct. 1 2006), *available at* http://www.msu.edu/~bauerj/papers/bauer-tprc-2006.pdf, at 2.

214. *See* Wu, *supra* note 8; Herman, *supra* note 206.

215. *See* Adam T. Thierer, *"Net Neutrality"—Digital Discrimination or Regulatory Gamesmanship in Cyberspace?* 507 POLICY ANALYSIS 1 (2004), *available at* http://www.cdt.org/speech/net-neutrality/20040112thierer.pdf.

216. *See* Ante & Crockett, *supra* note 2.

217. *See* Harold Feld, *Whose Line is it Anyway? The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23, 32–34 (2000).

Court to apply a higher level of scrutiny, not a lower one. In fact, the *Turner I* Court used the same reasoning to differentiate between broadcast and cable.[218] Thus, it could be argued not only that rational basis is the improper standard to apply to network neutrality rules, but also that the resulting standard would paradoxically be strict scrutiny.[219]

Indeed, the threat to freedom of expression from this is probably its most significant feature because the service ISPs provide was defined as a "content" service. The courts had no problem in allowing those in control of the "physical" and essential access routes for this content to dominate them. This can be seen as yet another weakness of the First Amendment doctrine developed in the "utilitarian age of regulation" and further proof of the dire need for a new underlying theory for telecommunications regulation.

V. THE "DISTRIBUTIVE NETWORK": A THEORY OF JUSTICE FOR THE REGULATION OF ACCESS TO THE INTERNET

The theory of distributive justice has only made its first steps in serving as the basis for a theory of communication policy. Drale[220] equated it with the assumption that "equal access to the means of self-determination is a fundamental human right."[221] She identified distributive justice's main concern with a democratic process free of coercion,[222] but deemed it impractical in its pure form.[223] It implied, she said, that the media were both the loci of democratic procedures and their eventual outcome,[224] and therefore it suggests and condones policies such as unfettered

218. *See* Turner Broad. Sys. v. FCC (*Turner I*), *supra* note 106, at 640–41.

219. This exact line of thought led the United States District Court for the Southern District of Florida in Comcast Cablevision of Broward County v. Broward County, Florida, 124 F. Supp. 2d 685 (S.D. Fla. 2000), to strike down a county ordinance that required cable operators who offered broadband Internet services to allow competitor ISPs equal access to their system. The district court found that the Florida cable operators did not exercise a bottleneck monopoly over access to the Internet the way they do in the cable television market. *Id.* at 697–98. Thus, the district court applied the strict scrutiny test developed in Miami Herald Pub'g Co. v. Tornillo, 418 U.S. 241 (1974), even though the court said that the ordinance would not survive even intermediate scrutiny, found that the ordinance abridged freedom of speech and the press by depriving cable operators of editorial discretion, infringed upon their liberty of circulation, and singled them out from all other speakers. *Comcast*, 124 F. Supp. 2d at 694–98. *Comcast* has been criticized for its departure from *Turner I*'s intermediate test. *See* David Wolitz, *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 4 YALE SYMP. L. & TECH. 6, 48–49 (2001).

220. Christina S. Drale, *Communication Media in a Democratic Society*, 9 COMM. L. & POL'Y 213, 216 (2004).

221. *Id.*

222. *Id.* at 219.

223. *Id.* at 226.

224. *Id.* at 223.

Internet access and others aimed at maximizing the active participation of ordinary citizens.[225] Chin identifies Rawls's theory with a positive construction of speech entitlements,[226] while Heyman sees distributive justice as the framework for determining what equality means in the context of state-supporting speech policies.[227] Others, however, find distributive justice in general and its Rawlsian interpretation in particular as either inadequate to serve as a basis for the discussion of communication policy or even detrimental to free speech. Thus, Collins finds that Rawlsian arguments fail to fully take into account the impact of network externalities, and therefore, may lead to sub-optimal results when applied to policies seeking equity and universal service. In particular, he claims that the Rawlsian model is "undynamic"[228] in that it does not consider adequately the problem of resource creation.[229] Redish and Klaudis argue that a right of access created under the guise of distributive justice has merely a redistributive effect affecting privately owned economic resources.[230]

We contend, however, as Redish and Klaudis suggest, that the Internet, perhaps more than any other technological medium of the past, lends itself to analysis as a technology that can provide for free expression to a maximum number of individuals.[231] As Balkin asserts, "The digital revolution makes possible widespread cultural participation and interaction that previously could not have existed on the same scale,"[232] and creates the opportunity for a democratic culture "in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals."[233]

As such, the Internet should not be seen as a technology in which the maximum social good is achieved through exclusive rights awarded to a select few (the model developed for the technologies of scarcity), but rather it is the relevant technology to which to apply the theory of justice. While the scarcity rationale may have justified a utilitarian model of

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225. *Id.* at 223–24.

226. Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 317 n.29 (1997).

227. Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1145 (1999).

228. Richard Collins, *From Monopolies, Virtual Monopolies and Oligopolies to . . . What? Media Policy and Convergence in South Africa and the United Kingdom*, 5 S. AFR. J. INFO. & COMM. 23, 33–35 (2004), *available at* http://link.wits.ac.za/journal/j05-collins-convergence.pdf.

229. *Id.* at 33.

230. Martin H. Redish & Kirk J. Klaudis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1085 (1999).

231. *Id.* at 1134.

232. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004).

233. *Id.*

justice, the lack of scarcity that characterizes the Internet mandates a regulatory theory that offers a "correcting" rule by invoking the maximin principle.

Rawls's theory of justice is relevant primarily because, as Rawls acknowledges, it is a political theory. It does not purport to dictate a moral position, but rather a practical resolution to a dispute, based on an agreement of fairness.[234] The Rawlsian theory is aimed at social actors as a normative and political theory.[235] It is the unique position of the Internet, and in particular the potential of broadband access, that renders it a forum that enables the participation of all, and not a closed community in which rules of seniority, aristocracy, and exclusivity may apply. Consequently, it creates the need for rules that negate all forms of tyranny and oppression, whether initiated by government or by dominance through wealth. Unfortunately, many observers are intrigued by the notion that the "network neutrality" controversy reflects a battle among the wealthy.[236] As our discussion of the Internet and its unique social role demonstrates, however, the "network neutrality" debate is playing out despite the wealthy. Indeed, large content providers, for whom the Internet is a source of income, would be damaged should access providers be allowed to discriminate. How and whether they will continue to provide services over the Internet, however, will be determined by economic considerations. The promise of the Internet does not lie in its support of large businesses, but in the opportunities it provides for those who could not have had a say in technologies of content scarcity. Bearing in mind the maximin rule's basic tenet that whatever the policy chosen, its first goal should be to improve the situation of the least advantaged, the theory of distributive justice becomes the most appropriate framework for an underlying theory of regulation of Internet access. Over the Internet, everyone is potentially a speaker. The theory of justice is designed first and foremost to help realize that potential.

The second element of the theory of justice that renders it appropriate is its establishment of basic rights for all prior to the discussion of the rules by which market forces will dictate policy. Indeed, as noted, current First Amendment theory is fixed on a bi-modal understanding of speech rights, correcting speech suppression by corporate control only when it involves economic interests. The abundance of space over the Internet provides for a multi-modal analysis of the control of speech over its channels and the recognition that corporate silencing of voices can be avoided

234. RAWLS, *Collected Papers*, *supra* note 11, at 390.
235. RAWLS, *Restatement*, *supra* note 11, at 20.
236. Kennard, *supra* note 4, at A3.

without challenging corporate speech because the wealth of space over the Internet fails to dictate utilitarian solutions based on a scarcity theory.

In this context, it is important to note that "network neutrality" is not about regulation of the Internet, but the opposite. Network neutrality is about ensuring that physical scarcity in access to the Internet, resulting from *Brand X*[237] and the *Wireline Facilities* order,[238] does not limit the abundance of content over the Internet. Indeed, network neutrality regulation may have been deemed superfluous had there not been access scarcity. The need to regulate content diversity in light of physical scarcity has been recognized as constitutional in *Turner*,[239] *Time Warner*,[240] and even by default in the elimination of the fairness doctrine in *Syracuse*.[241] What makes the introduction of the theory of justice through the acknowledged lack of scarcity a novel concept is the adherence to the promise of basic rights to all as a preliminary requirement before any other policy discussion. No such requirement exists in scarcity-induced utilitarian discourse.

The theory of justice, however, does not end by recognizing the need to guarantee basic rights. It is also about a need to "redress past harms," a legitimate goal recognized by the courts,[242] and a feature of distributive justice which distinguishes it from utilitarianism. Indeed, rectifying injustice as advocated by Rawls is mostly a utopian-theoretical construct. The "original position" is not possible because, in practical terms, people cannot be expected to forgo the rights they have acquired in property. However, even if acting under a hypothetical "veil of ignorance" can genuinely lead to a conclusion that provision of cable services under conditions of both physical and content scarcity generates a free speech right for operators, this right is not intuitively transferred to the provision of broadband services for at least two reasons. First, when cable operators (or local phone companies) acquired their initial license, they could not have expected to enjoy control of Internet content as well. Because this control is a kind of windfall, cable and local phone operators should not be allowed to control it or have an advantage in its control over the rest of society. Second, in the absence of scarcity, the right to discrimi-

237. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2006).

238. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853 (2005).

239. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 189–90 (1997).

240. Time Warner Entm't v. FCC (*Time Warner I*), 211 F.3d 1313, 1322 (D.C. Cir. 2000); Time Warner Entm't v. FCC (*Time Warner II*), 240 F.3d 1135, 1142–44 (D.C. Cir. 2001).

241. Syracuse Peace Council v. FCC, 867 F.2d 654, 665 (D.C Cir. 1989).

242. *Turner I*, 512 U.S. at 664.

nate, either to protect one's own speech or economic interests, cannot emerge without justification.

The theory of justice is not bereft of a moral compass. After the rules are determined and market conditions are restored, the theory of justice accepts that those that find themselves in positions of wealth may have also bettered their position. Prior to this stage, the lot of the least advantaged needs to be improved. In light of the regulation under assumptions of scarcity, and assuming opportunity for expression is agreed by all as the most basic of individual rights, the reality of abundance calls for a network in which no one misses an opportunity to speak. While the "wealthy" will always find a way to express themselves, the broadband Internet provides this opportunity to the least advantaged. Here again, the theory of justice provides a fair and just guideline.

A major concern for network neutrality proponents has been preserving the role of the Internet as the purveyor of twenty-first century innovation.[243] Egalitarian access to the Internet to participate in the economic opportunities it offers, will be maintained under a system that ensures neutrality. Additionally, the obligation to preserve freedom of speech to all is maintained. While access is a necessary condition, it is far from a sufficient one. Ensuring physical access to broadband Internet and enabling individual use, are critical in making network neutrality a worthy endeavor.

CONCLUSION

Framing communication policy through a prism of scarcity is no longer relevant in the age of broadband Internet. The utilitarian solutions by which the masses were silenced for the sake of the public good have become, at least with regard to the Internet's content, obsolete. The theory of distributive justice helps to re-establish freedom of expression as our first freedom, and has, for the first time, made this potentially achievable. It also helps us justify the rectification of past wrongs, or at least, of the unintended consequences of privilege awarded under the pretense of scarcity.

Network neutrality is about creating a potential voice for the many over the first true technology of abundance: broadband Internet. While acknowledging the inadequacy of existing jurisprudence to support a network neutrality policy, we have the obligation to seek and pursue innovative ways to develop a more just distribution of power over this

243. *See* Wu, *supra* note 8.

twenty-first century medium of mass communication, as well as to seek and pursue (a theory of) justice and justice alone.